A

Datuk Roger Tan Kor Mee & Ors v Hayatunnisah Sulaiman

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-189–04 OF 2022
SUPANG LIAN, AZIZUL AZMI ADNAN AND ALWI ABDUL WAHAB JJCA
18 JUNE 2025

C

Administrative Law — Judicial review — Certiorari and mandamus — Appeal against High Court's decision in allowing judicial review application — Respondent applied for judicial review against decision of Suruhanjaya Perkhidmatan Air Negara in dismissing her from employment — High Court allowed certiorari and mandamus — Whether conduct of respondent was so serious so as to justify her dismissal — Whether certiorari ought to be granted ex debito justitiae when there was procedural impropriety in decision-making process

D

E

Civil Procedure — Affidavit — Defective affidavit — Respondent filed judicial review application against her dismissal from employment — Respondent filed preliminary objections — Whether deponent of affidavit had no authority to affirm affidavit pursuant to s 17 of Suruhanjaya Perkhidmatan Air Negara Act 2006 — Whether affidavits were inadmissible on grounds of hearsay — Suruhanjaya Perkhidmatan Air Negara Act 2006 s 17

F

G

Labour Law — Dismissal — Unfair dismissal — Respondent applied for judicial review against decision of Suruhanjaya Perkhidmatan Air Negara in dismissing her from employment — High Court allowed certiorari and mandamus — Whether conduct of respondent was so serious so as to justify her dismissal — Whether certiorari ought to be granted ex debito justitiae when there was procedural impropriety in decision-making process

H

The respondent was a senior director of the legal division of Suruhanjaya Perkhidmatan Air Negara ('SPAN') whilst the appellants were the senior officials and members of the disciplinary committee of SPAN. The respondent faced multiple disciplinary charges related to her action of communicating confidential information belonging to SPAN to a third party without having first obtained approval to do so. During the disciplinary committee meeting, the respondent herself was not present but Mr Kirupakaran, the investigating officer in charge of the respondent's case, was present. The disciplinary committee of SPAN found the respondent guilty on three of the four charges and dismissed the respondent. This decision was affirmed by the disciplinary appeals committee of SPAN. Aggrieved, the respondent filed a judicial review

I

application against the said decision and argued that she had been unfairly dismissed. The High Court found in favour of the respondent, hence, the present appeal by the appellants. The respondent had filed a cross-appeal against the inadequacy of the award given by the High Court. In addition, the respondent had also filed the following preliminary objections: (a) s 17 of the Suruhanjaya Perkhidmatan Air Negara Act 2006 ('Act 654') did not list Mr Kirupakaran, a senior director in the enforcement division of SPAN, as an authorised delegate of SPAN, as such, he had no authority to affirm the affidavit on behalf of SPAN; and (b) the affidavits affirmed by Mr Kirupakaran and by Mr Santhanaban Mariappan (who was a member of SPAN as well as member of its disciplinary committee) were inadmissible on grounds of hearsay. The issue that arose for the court's determination was whether the conduct of the respondent was so serious so as to justify her dismissal.

Held, setting aside the order of the High Court, allowing the appeal and dismissing the cross-appeal with costs of RM30,000 here and below subject to allocatur:

(1) Section 17 of Act 654, which was relied on by counsel for the respondent, was inapplicable as it only regulated the delegation of powers conferred by statutes relating to water supply and sewerage services. It did not apply where Mr Kirupakaran, an employee of SPAN, affirmed an affidavit on behalf of SPAN in an employment dispute (see paras 16(a)(i), 19 & 21–22).

(2) It would be perfectly permissible for a witness or a deponent of an affidavit to refer to a provision of law. That would not offend the rule against hearsay. The court found that the statements in the affidavits referring to the statutory duties of the chairman of the disciplinary committee were not hearsay, and no other statement had been specifically identified by the respondent. As such, the contention that the affidavits affirmed by Mr Kirupakaran and Mr Santhanaban Mariappan offended the rule against hearsay was not made out (see paras 16(a)(ii), 24 & 27–28).

(3) The facts of the present case showed that the respondent had communicated confidential information belonging to SPAN to a third party without having first obtained approval to do so. She was a senior director of the legal division of SPAN, and must be expected to know that unauthorised disclosure by SPAN's employee of information obtained in the course of his or her duties constituted a breach of the statutory obligation of secrecy under Act 654 and was also an offence. The actions of the respondent breached the trust and confidence that were reposed in her by her employer, and hence her dismissal was entirely appropriate in the circumstances (see paras 16(b) & 33–34).

(4) Certiorari was a discretionary remedy, and hence just because a decision maker may have committed a reviewable error did not mean that certiorari ought to be granted *ex debito justitiae*. Certiorari and mandamus may only be granted if it would be just and equitable in the circumstances to do so. Thus, if a tribunal committed an error of law by misstating or misapplying the law but nonetheless arrived at the correct decision, certiorari would not lay against the decision so arrived at. Therefore, even if there may have been procedural impropriety in the decision-making process, the court was assured that the decision to dismiss the respondent was the correct ultimate decision. The proper exercise of judicial discretion would be to refuse the orders of certiorari and mandamus (see paras 16(c) & 30–31).

(5) On the facts of the present case, the respondent had been given full opportunity to present her case not only before the disciplinary appeals committee but also before the High Court. For this reason, the court did not consider that whatever procedural improprieties there might have been would have prevented her from adducing evidence that could have had a material bearing on whether the decision to dismiss her was ultimately the correct decision (see paras 16(d) & 35).

(6) With the appeal having been allowed, it must necessarily follow that the remainder of the cross-appeal (other than the cross-appeal on the preliminary objections, which the court had earlier dismissed) must also be dismissed. The additional reliefs prayed for by the respondent could not be granted when the appellants being successful in its appeal. The other grounds advanced by the respondent seeking judicial review must also necessarily fail, as the court had found that the ultimate decision to dismiss the respondent was correct (see paras 16(e) & 36).

[Bahasa Malaysia summary

Responden merupakan pengarah kanan bahagian undang-undang Suruhanjaya Perkhidmatan Air Negara ('SPAN') manakala perayu-perayu adalah pegawai-pegawai kanan dan ahli-ahli jawatankuasa tatatertib SPAN. Responden menghadapi pelbagai pertuduhan tatatertib berkaitan tindakannya menyampaikan maklumat sulit milik SPAN kepada pihak ketiga tanpa terlebih dahulu mendapat kelulusan untuk berbuat demikian. Semasa mesyuarat jawatankuasa tatatertib, responden sendiri tidak hadir tetapi Encik Kirupakaran, pegawai penyiasat yang mengendalikan kes responden, hadir. Jawatankuasa tatatertib SPAN mendapati responden bersalah atas tiga daripada empat pertuduhan tersebut dan memecat responden. Keputusan ini disahkan oleh jawatankuasa rayuan tatatertib SPAN. Terkilan, responden memfailkan permohonan semakan kehakiman terhadap keputusan tersebut dan berhujah bahawa dia telah dipecat secara tidak adil. Mahkamah Tinggi membuat dapatan yang memihak kepada responden, justeru, rayuan semasa oleh perayu-perayu. Responden telah memfailkan rayuan balas terhadap

ketidakcukupan award yang diberikan oleh Mahkamah Tinggi. Di samping itu, responden juga telah memfailkan bantahan-bantahan awal berikut: (a) s 17 Akta Suruhanjaya Perkhidmatan Air Negara 2006 ('Akta 654') tidak menyenaraikan Encik Kirupakaran, pengarah kanan di bahagian penguatkuasaan SPAN, sebagai perwakilan SPAN yang diberi kuasa, oleh itu, beliau tidak mempunyai kuasa untuk mengesahkan afidavit SPAN; dan (b) afidavit yang disahkan oleh Encik Kirupakaran dan oleh Encik Santhanaban Mariappan (yang merupakan ahli SPAN serta ahli jawatankuasa tatatertibnya) tidak boleh diterima atas alasan ianya adalah dengar cakap. Isu yang timbul untuk penentuan mahkamah ialah sama ada kelakuan responden begitu serius sehingga mewajarkan pemecatannya.

Diputuskan, mengenepikan perintah Mahkamah Tinggi, membenarkan rayuan dan menolak rayuan balas dengan kos RM30,000 di sini dan di bawah tertakluk kepada alokatur:

(1) Seksyen 17 Akta 654, yang disandarkan oleh peguam responden adalah tidak terpakai kerana ia hanya mengawal selia pewakilan kuasa yang diberikan oleh statut berkaitan dengan bekalan air dan perkhidmatan pembetungan. Ia tidak terpakai apabila Encik Kirupakaran, seorang pekerja SPAN, mengesahkan afidavit bagi pihak SPAN dalam pertikaian yang berkaitan dengan pekerjaan (lihat perenggan 16(a)(i), 19 & 21–22).

(2) Saksi atau deponen afidavit adalah dibenarkan untuk merujuk kepada peruntukan undang-undang. Itu tidak akan menyalahi peraturan terhadap dengar cakap. Mahkamah mendapati pernyataan dalam afidavit yang merujuk kepada tugas berkanun pengerusi jawatankuasa tatatertib bukan dengar cakap, dan tiada pernyataan lain yang dikenal pasti secara khusus oleh responden. Oleh itu, hujahan bahawa afidavit-afidavit yang disahkan oleh Encik Kirupakaran dan Encik Santhanaban Mariappan melanggar peraturan terhadap dengar cakap gagal dibuktikan (lihat perenggan 16(a)(ii), 24 & 27–28).

(3) Fakta kes semasa menunjukkan bahawa responden telah menyampaikan maklumat sulit milik SPAN kepada pihak ketiga tanpa terlebih dahulu mendapat kelulusan untuk berbuat demikian. Beliau adalah pengarah kanan bahagian undang-undang SPAN, dan haruslah dianggap mengetahui bahawa pendedahan maklumat yang diperolehi semasa menjalankan tugas oleh pekerja SPAN tanpa kebenaran merupakan pelanggaran kewajipan berkanun kerahsiaan di bawah Akta 654 dan juga merupakan satu kesalahan. Tindakan responden telah melanggar kepercayaan dan keyakinan yang diberikan oleh majikannya kepadanya, dan oleh itu pemecatannya adalah secara keseluruhannya wajar dalam keadaan tersebut (lihat perenggan 16(b) & 33–34).

(4) Certiorari ialah remedi mengikut budi bicara, dan oleh itu hanya kerana pembuat keputusan mungkin telah melakukan kesilapan yang boleh

disemak tidak bermakna certiorari sepatutnya diberikan *ex debito justitiae*. Certiorari dan mandamus hanya boleh diberikan jika ia adalah adil dan saksama dalam keadaan untuk berbuat demikian. Oleh itu, jika tribunal melakukan kesilapan undang-undang dengan cara tersalah menyatakan atau menyalahgunakan undang-undang tetapi setelah itu menyampaikan keputusan yang betul, certiorari tidak terpakai terhadap keputusan yang dibuat itu. Oleh itu, walaupun mungkin terdapat ketidakwajaran prosedur dalam proses membuat keputusan, mahkamah yakin bahawa keputusan untuk memecat responden adalah keputusan muktamad yang betul. Perlaksanaan budi bicara kehakiman yang sewajarnya ialah menolak perintah certiorari dan mandamus (lihat perenggan 16(c) & 30–31).

(5) Berdasarkan fakta kes semasa, responden telah diberi peluang sepenuhnya untuk membentangkan kesnya bukan sahaja di hadapan jawatankuasa rayuan tatatertib tetapi juga di hadapan Mahkamah Tinggi. Atas sebab ini, mahkamah tidak menganggap bahawa apa jua ketidakwajaran prosedur yang mungkin berlaku akan menghalangnya daripada mengemukakan keterangan yang mungkin mempunyai kesan material ke atas persoalan sama ada keputusan untuk memecatnya pada akhirnya merupakan keputusan yang betul (lihat perenggan 16(d) & 35).

(6) Memandangkan rayuan telah dibenarkan, maka rayuan balas yang lainnya (selain daripada rayuan balas atas bantahan awal, yang sebelum ini ditolak oleh mahkamah) harus ditolak. Relief-relief tambahan yang dipohon oleh responden tidak dapat diberikan apabila perayu-perayu berjaya dalam rayuan mereka. Alasan-alasan lain yang dikemukakan oleh responden yang memohon semakan kehakiman juga semestinya gagal, kerana mahkamah telah mendapati bahawa keputusan muktamad untuk memecat responden adalah betul (lihat perenggan 16(e) & 36).]

Cases referred to

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (distd)

Legislation referred to

Rules of Court 2012 O 41 r 5(1), 5(2)
Statutory Bodies (Discipline and Surcharge) Act 2000 Second Schedule
Statutory Bodies Disciplinary Regulations reg 33
Suruhanjaya Perkhidmatan Air Negara Act 2006 s 17, 17(1)

Appeal from: *Hayatunnisah bt Sulaiman v Datuk Roger Tan Kor Mee (Pengerusi Jawatankuasa Tatatertib Kumpulan Pengurusan Tertinggi dan Eksekutif (Tujuan Buang Kerja Atau Turun Pangkat) Suruhanjaya Perkhidmatan Air Negara (SPAN)) & Ors* [2022] MLJU 929 (High Court, Kuala Lumpur)

Thavalingam C Thavarajah (with Aida Yasmin Cheree Mohamad and Muhammad Taqiyuddin Mohd Redzuan) (T Thavalingam & Co) for the appellant.
Ebrina Zubir (Maniam Nair & Co) for the respondent.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal relates to an application for judicial review commenced by the respondent in this case, Puan Hajah Hayatunnisah Sulaiman, who contended that (among others) she was unfairly dismissed by her employer. The High Court had allowed her application for judicial review. After hearing the appeal, we unanimously allowed the appellants' appeal.

[2] These grounds record the reasons for our decision, and constitute the judgment of the court.

Material background facts

[3] The respondent applicant was an employee of the sixth appellant, Suruhanjaya Perkhidmatan Air Negara ('the Commission'), a statutory corporation established under the Suruhanjaya Perkhidmatan Air Negara Act 2006 to regulate the water and sewage related industries in Malaysia. She was dismissed. At the time of her dismissal, she was the senior director of the Legal Division in the Commission.

[4] Disciplinary proceedings were carried out against the respondent on four charges. They are summarised below:

(a) the respondent was charged with disclosing copies of legal opinions issued by the Legal Division of the Commission to Associate Professor Dr Rasyikah Md Khalid, a law lecturer in the law faculty of Universiti Kebangsaan Malaysia without the prior approval of the Commission. The disclosures were made for the purposes of a book entitled 'Isu Perkhidmatan Pembekalan Air di Malaysia — Tafsiran di bawah Akta Industri Perkhidmatan Air 2006 dan Perundangan Subsidiari' (referred to here as the 'second book'). The disclosures were said to have been made:

   (i) at a meeting on 21 November 2016; and

   (ii) via emails on 8 December 2016.

   As we shall see, the date of the first disclosure will be significant;

(b) the respondent was charged with commencing publication works for a

book entitled 'Water Services Law and Landmark Cases' (referred to here as the 'first book') without prior authorisation, and with requesting lists of cases decided under the State water enactments for the purposes of the first book from various water services operators without disclosing the purpose of such information request;

(c) the respondent was charged with making further unauthorised disclosures to Associate Professor Dr Mahmud Zuhdi bin Mohd Nor, with providing a referee's letter to him and with providing the log-in details for LawNet services to a third party. Among the documents said to have been disclosed to Dr Mahmud Zuhdi were:

(i) copies of papers tabled a meeting of the Commission and of its rules and procedures committee;

(ii) a copy of the Water Industry Performance Report 2014 (which was a document with restricted circulation);

(iii) a copy of the draft Water Services Industry (Bulk Water Supply Agreement) Rules 2015 prior to its publication in the government *gazette*; and

(iv) copies of various draft contracts prepared by the Commission.

(d) finally, the respondent was charged with bringing the Commission into disrepute by threatening her personal assistant and by her unprofessional conduct that had resulted in a high employee turnover rate in the Legal Division.

[5] It was an undisputed fact that the respondent had tabled her proposal for the second book at a management retreat of the Commission held between 23 and 25 November 2016.

[6] The four charges were set out in a show cause letter dated 30 May 2017 (see E6/402). The respondent provided her responses to the charges by way of a letter dated 19 June 2017 (see E6/434).

[7] The Disciplinary Committee convened a meeting on 26 June 2017 to deliberate the case against the respondent. It was not disputed that one Mr Kirupakaran was present at the meeting. According to the respondent, Mr Kirupakaran was the investigating officer in charge of the respondent's case. The respondent herself was not present at the Disciplinary Committee meeting deliberating on whether the charges had been made out and whether the respondent's responses to the show cause latter provided a reasonable explanation of her actions.

[8] The decision of the Disciplinary Committee was communicated to the respondent via letter on 28 July 2017 (see E7/653). The respondent was found guilty on three of the four charges. This letter explained that her services were terminated.

[9] She then appealed to the Disciplinary Appeals Committee. The respondent attended the hearing of the Disciplinary Appeals Committee, and was given the opportunity to argue her appeal.

[10] On 16 April 2018, the Disciplinary Appeals Committee issued a letter (see E9/936) to the respondent, informing her that the decision made by the Disciplinary Committee was affirmed and that the respondent was accordingly dismissed.

[11] The respondent commenced judicial review proceedings at the High Court.

The findings of the High Court

[12] The High Court found that the presence of Mr Kirupakaran at the Disciplinary Committee meeting had breached the rules of natural justice, and granted an order of certiorari quashing the dismissal of the respondent. The material portions of the grounds of judgment of the learned High Court judge stated as follows:

> [36] Learned counsel for the applicant took exception to the presence of Encik Kirupakaran at the DC proceedings. The presence of Encik Kirupakaran is said to be highly prejudicial to the applicant since it would offend the principle of *nemo judex in casua sua.* Learned counsel relied on the case of *Lee Mew Kwan v Royal Lake Club (through Jasmin bt Mohd Sharif as Secretary and Officer to Kelab Taman Perdana Diraja Kuala Lumpur)* [2013] 1 MLJ 583. It carries the proposition that the complainant or prosecutor should not participate in a decision and should not even appear to participate therein.
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> [37] I am of the respectful view that there is merit in this line of argument. In the instant case, the adherence to the principle of *nemo judex* is intertwined with another principle of *audi alteram partem.* Encik Kirupakaran was present at the DC proceedings. He might not have participated in the hearing. He might have. But his presence raises a red flag on the objectivity and impartiality of the DC.
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> [38] First, is the *nemo judex* rule. In *Lee Mew Kwan,* the composition of the appeal committee included one Mr Sankar, who had a complaint lodged against him by the plaintiff at that time. The Appeal Committee affirmed the disciplinary panel's decision. Despite the said Mr Sankar declaring himself not to participate in the decision-making process, he was present to make up the quorum. In delivering the judgment of the court, Prasad Abraham J (later FCJ) held that:
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> > I find the hearing of the appeal was conducted unfairly. The Appeal Committee

had a potpourri of members, all of whom should not in all fairness have sat in the first place and deliberated on the matter and by the time the Appeal Committee was eventually formed it can hardly be said that objectivity and impartiality could be exercised as much discussion had already taken place on the appeal. I refer to the case of *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and to the judgment of His Lordship Edgar Joseph JR J as he then was at p 491 and I quote:

> It was common ground that Mr Ogle was in fact present throughout the deliberations of the disciplinary authority and no reasons were vouchsafed to this court as to the necessity for his presence there. I accept that Mr Ogle did not discuss the case with members of the disciplinary authority nor did he take part in their deliberations. The fact remains, however, that he was present with the members of the disciplinary authority during their deliberations and decision.

[39] Applying the said proposition to the facts of the case, it does not matter even if Encik Kirupakaran had kept quiet throughout the DC proceedings. His presence at the DC proceedings has raised the question of the objectivity and impartiality of the DC itself.

[40] Next, the *audi alteram partem* rule. I do not respectfully find any necessity, legal or otherwise, for Encik Kirupakaran, as somebody who was in charge of the investigation of the applicant, to be present at the DC proceedings. But, if there is an absolute necessity for the Kirupakaran to be present, of which no finding is made here, then it is only proper for the applicant to be allowed to be present too.

The grounds of appeal

[13] The appellant advanced four grounds of appeal against the decision of the High Court:

(a) it was contended that the High Court had erred in law and in fact when it found that Mr Kirupakaran had attended the Disciplinary Committee proceedings as an investigating officer or as an interested party in the disciplinary process instituted against the respondent even though there was no evidence before the court to this effect;

(b) it was argued that the High Court erred when it failed to hold that, because the respondent had been granted the opportunity to appear and submit her case orally before the Disciplinary Appeals Committee, whatever breach of natural justice that may have occurred at the prior Disciplinary Committee meeting would have been cured by the proceedings at, and the decision of, the Disciplinary Appeals Committee;

(c) it was argued that the High Court had erred in law and in fact when it failed to give due consideration that the disciplinary offences committed by the respondent were serious and warranted the punishment of dismissal particularly in view of the fact that she held a critical and senior

position of trust in the Commission. This breach of duty meant that the Commission could no longer repose the necessary trust and confidence in the respondent to continue in employment in the position she occupied; and

(d) finally, it was contended that the High Court had erred in law when it granted an order of mandamus to compel the Commission to compensate the respondent for the loss of her future earnings as if she was reinstated in her original designation without any loss of seniority, increment, emoluments and other benefits which she had enjoyed until she attained the retirement age of 60 years.

The cross-appeal

[14] The respondent filed a notice of cross-appeal. The grounds of the cross-appeal were as follows:

(a) that the High Court ought to have allowed interest at a rate of 5%pa on the compensation awarded;

(b) that the High Court ought to have awarded damages for unlawful dismissal of the respondent;

(c) that the High Court ought to have awarded general damages, aggravated damages and exemplary damages to the respondent;

(d) that the High Court ought to have ordered an investigation into the arrears of salary, emoluments, allowances and other benefits that the respondent ought to have received;

(e) that the High Court ought to have allowed the respondent's preliminary objections relating to:

(i) the affidavit affirmed by Mr Kirupakaran that was said to be defective; and

(ii) the affidavit affirmed by Mr Santhanaban Mariappan on account of it being hearsay.

(f) that the High Court ought to have ruled that decision to terminate the services of the respondent was void ab initio and an illegality on account of the legal distinction between the termination of services and dismissal;

(g) that the High Court ought to have ruled that the whole of the disciplinary proceedings against the respondent was null and void as it had not been carried out by a proper disciplinary committee and was in beach of the principles of natural justice; and

(h) that the High Court had failed to rule on issues No 3 to No 10 that had been raised in the application for judicial review. These issues raised a

whole slew of allegations, including the contentions that the Disciplinary Committee and the Disciplinary Appeals Committee had taken into account irrelevant considerations, failed to take into account relevant considerations, that the proceedings of the Disciplinary Committee were in breach of the rules of natural justice by failing to grant an extension of time to the respondent, by its failure to give the respondents access to documents requested and failed to grant the respondent an oral hearing, that the Disciplinary Committee had misconstrued the applicable provisions of the Suruhanjaya Perkhidmatan Air Negara Act 2006, and that there was arbitrariness and malice in the proceedings of the Disciplinary Committee and the Disciplinary Appeals Committee.

[15] For reasons that will be apparent, these numerous grounds of cross-appeal — many of which we observe with not a little regret appeared to be overlapping — need not detain us for the purposes of the analysis of the merits of the case.

Summary of this court's decision

[16] The following summarises this court's decision in this case:

(a) we were of the view that the preliminary objections raised by the respondent were without merit because:

(i) s 17 of the Suruhanjaya Perkhidmatan Air Negara Act 2006, which was relied on by counsel for the respondent, was inapplicable as it only regulates the delegation of powers conferred by statutes relating to water supply and sewerage services. It did not apply where Mr Kirupakaran, an employee of the Commission, affirmed an affidavit on behalf of the Commission in an employment dispute; and

(ii) the contention that the affidavits affirmed by Mr Kirupakaran and Mr Santhanaban Mariappan offended the rule against hearsay was not made out, as the statements in the affidavits that have been specifically identified by the respondent were not in fact hearsay.

(b) the facts of the present case showed that the respondent had communicated confidential information belonging to the Commission to a third party without having first obtained approval to do so. She was a senior director of the Legal Division of the Commission, and must be expected to know that unauthorised disclosure by an employee of the Commission of information obtained in the course of his or her duties constituted a breach of the statutory obligation of secrecy under the Suruhanjaya Perkhidmatan Air Negara Act 2006 and was also an offence. The actions of the respondent breached the trust and confidence that

were reposed in her by her employer, and hence her dismissal was entirely appropriate in the circumstances;

(c) even if there may have been procedural impropriety in the decision-making process (and we consider that it will not be necessary on the facts of the present case to provide a definitive finding whether or not this was the case for the decisions of the Disciplinary Committee and the Disciplinary Appeals Committee), we are assured that the decision to dismiss the respondent was the correct ultimate decision. The proper exercise of judicial discretion would be to refuse the orders of certiorari and mandamus;

(d) on the facts of the present case, the respondent had been given full opportunity to present her case not only before the Disciplinary Appeals Committee but also before the High Court. For this reason, we do not consider that whatever procedural improprieties there might have been would have prevented her from adducing evidence that could have had a material bearing on whether the decision to dismiss her was ultimately the correct one; and

(e) the appellant's appeal was thus allowed, which as a necessary corollary meant that the whole of the cross-appeal must be dismissed.

[17] The summary in the preceding paragraphs are explained in further detail in, and must be read as being subject to, the following paragraphs.

THE RESPONDENT'S PRELIMINARY OBJECTIONS

Mr Kirupakaran's affidavit

[18] Mr Kirupakaran Visuvalingam was the senior director in the enforcement division of the Commission. He affirmed an affidavit on behalf of all the appellants, which was dated 2 February 2021. Leaned counsel challenged Mr Kirupakaran's authority to affirm the affidavit on behalf of the Commission. He placed reliance on s 17 of the Suruhanjaya Perkhidmatan Air Negara Act 2006, which he said did not list Mr Kirupakaran as an authorised delegatee of the Commission.

[19] In our judgment, that reliance was misplaced, as s 17 only regulates the delegation of powers conferred by statutes relating to water supply and sewerage services.

[20] At the material time, s 17 of the Suruhanjaya Perkhidmatan Air Negara Act 2006 reads as follows:

17 Delegation of the Commission's functions or powers

(1) The Commission may, in writing, delegate any of the functions and powers imposed or conferred on it by the water supply and sewerage services laws, except the power to make subsidiary legislation, to —

(a) the Chairman;

(b) a member of the Commission; or

(c) a committee.

(2) Any person delegated with such function and power shall be bound to observe and have regard to all conditions and restrictions imposed by the Commission and all requirements, procedures and matters specified by the Commission.

(3) Any function and power delegated under this section shall be performed and exercised in the name and on behalf of the Commission.

(4) The delegation under this section shall not preclude the Commission itself from performing or exercising at any time any of the delegated functions and powers.

(5) The delegation under this section shall not preclude the Commission itself from performing or exercising at any time any of the delegated functions and powers.

[21] It is tolerably clear from the plain words of s 17(1) that the functions and powers that are the subject of that section are those that have been conferred on the Commission 'by the water supply and sewerage services laws', an expression which has been defined to mean the Suruhanjaya Perkhidmatan Air Negara Act 2006, the Water Services Industry Act 2006 and all subsidiary legislation made under these Acts. Thus those functions and powers that have been conferred by these specific statutes may only be delegated to the named persons in s 17(1), and would not include, for example, the authority to affirm an affidavit on behalf of the Commission in connection with an employment dispute.

[22] The absurdity of the construction proposed by counsel for the respondent is made plain if the logic of his argument is taken to its logical conclusion. It cannot be correct that the Commission could only, for example, make payment for a utility bill only through one of the persons specified in s 17(1). As a statutory corporation, the Commission is not a natural person, and can only act though its agents and employees. It stands to reason that the day-to-day affairs of the Commission must be conducted through employees such as Mr Kirupakaran.

The rule against hearsay

[23] The second preliminary objection raised by learned counsel for the respondent was that the affidavits affirmed by Mr Kirupakaran and by Mr Santhanaban Mariappan (who was a member of the Commission as well as member of its Disciplinary Committee) were inadmissible on grounds of hearsay. It was advanced for the respondent that Mr Kirupakaran was in no position to depose his views on the scope of the statutory duties of the chairmen and members of the Disciplinary Committee and Disciplinary Appeals Committee. A similar argument was raised in respect of Mr Santhanaban: that the contents of his affidavit regarding scope of the statutory duty under reg 33 of the Statutory Bodies Disciplinary Regulations in the Second Schedule to the Statutory Bodies (Discipline and Surcharge) Act 2000 also hearsay. Regulation 33 provides for the duty of the chairman of the Disciplinary Committee to consider whether the offence complained of warrants a punishment of dismissal or reduction in rank. It is only if the answer to this question in in affirmative that the chairman would refer the case to the Disciplinary Committee.

[24] In our judgment, the contention of hearsay was not made out, as the statements that have been specifically identified were not in fact hearsay.

[25] The rule against hearsay for hearings on affidavits is set out in O 41 r 5(1) of the Rules of Court 2012:

> 5 Contents of affidavit (O 41 r 5*)*
>
> (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

[26] By sub-r 5(2), an exception is created for interlocutory proceedings. Order 41 r 5(1) was relied upon by the respondent in support of the preliminary objection and a ruling that the two affidavits be ruled inadmissible.

[27] It would be perfectly permissible for a witness or a deponent of an affidavit to refer to a provision of law. That would not offend the rule against hearsay. Of course, witnesses are not competent to testify as to the proper construction of such laws — for that is matter for the court to decide — but they may properly testify as to what they understood by what the law said, if their understanding of the law was itself a fact in issue. Crucially, apart from the references to the scope of duties of the chairman for the Disciplinary Committee, counsel for the respondent did not identify which other

A statements in the affidavits offended the rule against hearsay. This was a matter that the learned judge at the High Court had himself observed.

[28] For these reasons, we are of the view that the learned High court judge was correct to have dismissed the respondent's preliminary objections. The B statements in the affidavits referring to the statutory duties of the chairman of the Disciplinary Committee were not hearsay, and no other statement had been specifically identified by the respondent.

C ANALYSIS AND DECISION

[29] The threshold issue to be determined was whether the conduct of the respondent was so serious so as to justify her dismissal. If it was, then regardless of whether the Disciplinary Committee or the Disciplinary Appeals D Committee had committed a reviewable error, the courts would not order judicial review against the decision to dismiss the respondent.

[30] Certiorari is a discretionary remedy, and hence just because a decision maker may have committed a reviewable error does not mean that certiorari E ought to be granted *ex debito justitiae*. Certiorari and mandamus may only be granted if it would be just and equitable in the circumstances to do so. Thus if a tribunal committed an error of law by misstating or misapplying the law but nonetheless arrived at the correct decision, certiorari will not lie against the decision so arrived at. The ultimate decision was correct, and the fact that it was F arrived at for the wrong reasons ought not result in a quashing of such decision. The authority for this proposition is the Federal Court case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 where it was held by Sri Ram JCA as follows:

> G In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act — and we hasten to repeat this is not the case here — its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available *ex debito justitiae* to an applicant who is able to H demonstrate an error of law on the part of a public decision-taker.

[31] It follows as a necessary corollary that where there may have been procedural impropriety in the decision-making process, but the reviewing court is assured that the decision arrived at was the correct ultimate decision, I then the proper exercise of judicial discretion would be to refuse the order of certiorari. We would hasten to add that more caution ought to be exercised by the court in refusing certiorari in cases of procedural impropriety when compared to cases where a tribunal may have misapplied the law. The reason is that breach of natural justice may mean that the complainant may have been

prevented from putting forward his or her case, and so the outcome of the decision on the merits may have been different had the wrongfully excluded arguments been properly considered. Nonetheless, there are cases where the merits of the substantive claim are so clear that, even if there had been no breach of natural justice, it would be apparent that the tribunal would have arrived at the same decision on the merits. In such cases justice would be properly served by dismissing the application for review.

[32] This present case is one such case. The respondent in this case had communicated confidential information belonging to the Commission to a third party without having first obtained approval to do so. Even if it could be argued that there had been tacit approval for such disclosures to be made because her proposal for the second book had been tabled at the management retreat of the Commission held between 23 and 25 November 2016 as part of the key performance indicators of the Legal Division, the fact remained that she had disclosed two compilations of the legal opinions on 21 November 2016, which was before the date of the retreat. Clearly, the disclosures that had been made before she tabled her proposal for the second book had been made without proper authorisation, whether express or implied.

[33] That the respondent was a senior director of the Legal Division of the Commission weighed heavily in our decision. As a senior director of the legal function, she must be expected to know the applicable laws. Unauthorised disclosure by an employee of the Commission of information obtained in the course of his or her duties constituted a breach of the statutory obligation of secrecy under the Suruhanjaya Perkhidmatan Air Negara Act 2006 and was also an offence.

[34] In our considered view, the decision by the Commission to dismiss the respondent was ultimately the correct one, and did not offend the proportionality principle. That the respondent made the disclosures not for the purposes of pecuniary gain did not change the fact that the breach of the obligation of secrecy was a serious one, and that the position held by the respondent required utmost trust and confidence. The actions of the respondent breached that trust and confidence that were reposed in her, and hence her dismissal was entirely appropriate in the circumstances.

[35] We observe that the fact that the respondent had made the disclosures complained of was not in material dispute. She had been given every opportunity to provide written representations before the Disciplinary Committee meeting. Even though she had not been present before the Disciplinary Committee, she did appear at the hearing of her appeal before the Disciplinary Appeals Committee. On the facts of the present case, we do not consider that the respondent had been prevented from properly arguing her

case, and hence the risk that we had cautioned against at para [31] above when invoking the rule in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* does not arise.

The cross-appeal

[36] With the appeal having been allowed, it must necessarily follow that the remainder of the cross-appeal (other than the cross-appeal on the preliminary objections, which we had earlier dismissed) must also be dismissed. The additional reliefs prayed for (set out in paras [14](a) to [14](d) ante) cannot now be granted, with the appellant being successful in its appeal. The other grounds advanced by the respondent seeking judicial review must also necessarily fail, as we have found that the ultimate decision to dismiss the respondent was correct.

[37] For the reasons explained, we allowed the appeal and dismissed the cross-appeal with costs of RM30,000 here and below, such costs to be subject to an allocatur. We set aside the orders of the High Court dated 7 March 2022.

Order of High Court set aside; appeal allowed; cross-appeal dismissed with costs of RM30,000 here and below subject to allocatur.

Reported by Dzulqarnain Ab Fatar